

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JOSE R. GALARZA et al.,

Plaintiffs, Cross-defendants and
Respondents,

v.

MICHAEL P. PETTIT,

Defendant, Cross-complainant and
Appellant.

F040954

(Super. Ct. No. 241367-SPC)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Kenneth W. Kind for Defendant, Cross-complainant and Appellant.

Michael T. Whittington for Plaintiffs, Cross-defendants and Respondents.

-ooOoo-

Defendant Michael Pettit appeals from judgment in favor of plaintiffs Jose R. Galarza and Angelina Galarza after court trial. Plaintiffs were granted quiet title to a prescriptive easement, which we will call the “Main Road,” across defendant’s property; and plaintiffs successfully defended against defendant’s cross-complaint for trespass and injunctive relief regarding what we will call the “Secondary Road.” On appeal, defendant contends as follows: there is insufficient evidence that plaintiffs’ use of the

Main Road was hostile to establish a prescriptive easement; plaintiffs' use of the Main Road was offset by their "unclean hands" because they never obtained a certificate of occupancy to live on their property; and the court should have awarded damages to defendant based on plaintiffs' trespass and the erosion of the topsoil resulting from vehicular traffic on the Secondary Road. We affirm.

FACTS AND PROCEEDINGS

Plaintiffs purchased a 20-acre parcel in an undeveloped agricultural and ranching area near Edison in Kern County in 1991. They used two unpaved roads to reach their property--the Main Road and the Secondary Road. These roads cut across an adjoining parcel until they reached plaintiffs' property. Plaintiffs used the Main Road nearly every day to reach their property, but they used the Secondary Road only in rainy weather.

Defendant purchased the adjoining 148-acre parcel in 1999. Shortly after purchase, he demanded that plaintiffs stop using these unpaved roads and claimed such use resulted in destruction and erosion of the topsoil and interfered with his plans to build a cattle feed yard. The parties exchanged various demands and the instant litigation resulted.

Plaintiffs filed suit against defendant and sought to quiet title to a prescriptive easement over the Main Road. Defendant filed a cross-complaint for trespass and sought damages based on the alleged damaged to his property caused by plaintiffs' continued use of the two unpaved roads. Defendant also alleged plaintiffs should have been using the "Northern Road," which was an alternative route to plaintiffs' property but went through extremely steep canyons and valleys.

Evidence adduced at trial traced the history of the use of the parcels and roads in question.

*Plaintiffs' property (the dominant tenement) and the Main Road*¹

The properties and roads at issue are located in Kern County, just north of Highway 58 and Towerline Road, in the northwest quarter of "Section Six (6), Township Thirty (30) South, Range Thirty (30) East, M.D.B.M., Kern County" The northwest quarter of section six is a square tract of undeveloped agricultural and ranching land. It is bordered on the south by the Giumarra vineyards. The western border is Towerline Road, an unpaved Southern California Edison utility easement road which runs north and south. The boundaries of the Giumarra vineyards and Towerline Road are not disputed or at issue in this case.

At the time of acquisition in 1991, plaintiffs' parcel consisted of undeveloped agricultural and ranch lands and contained several hills, valleys, and inclines. Plaintiffs purchased their property at a state auction for delinquent taxes. Plaintiff Jose R. Galarza (Galarza) was familiar with the property because he had tried to purchase it before. He had not entered the property prior to the auction, but he had physically viewed the parcel while standing on the Giumarra vineyards, near the southern boundary of his prospective property. Galarza testified that from that location, he could see the Main Road going "toward the top of the hill" to the northern portion of his property.

The Main Road is an unpaved road, which is reached by turning northeast from Towerline Road into the far southwestern corner of the northwest quarter of section six. There is a locked green gate at the beginning of the Main Road. The Main Road proceeds in a northeastern diagonal and enters the far southwestern corner of plaintiffs'

¹An easement has two tenements. The first tenement is the dominant one, which is in favor of the owner of the easement. The second tenement is a servient one, which is owned by the owner of the burdened land. (Civ. Code, § 803; *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 865; *Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 562.)

property. The majority of the Main Road crosses other adjoining parcels in that quarter before it enters plaintiffs' property.

Shortly after purchase of the property, Galarza turned from Towerline Road into the Main Road and came across the locked green gate. He also saw Tony Berry, who was living in a trailer on the property. Galarza told Berry that he had just purchased the property on the northern side of the northwest quarter of section six, and Berry gave Galarza the key to the locked green gate. Galarza used the key, unlocked the gate, and drove along the Main Road to the top of his property. There were no other gates on the Main Road and plaintiffs' property was not fenced. Galarza subsequently constructed fences along the entire border of his property and installed a gate where the Main Road entered his land.

Galarza testified the Main Road was in the same condition in 1991 as it appeared at the time of the instant dispute and trial. Galarza never believed Tony Berry owned any property within the quarter, and never asked Berry for permission to travel across the Main Road or any other portion of section six. Galarza believed he was traveling over private property when he used the Main Road, but he never tried to determine who owned that property. Galarza never believed the Main Road was a public highway.

Galarza testified he used the Main Road every day to reach his property. After he purchased the land in December 1991, he spent six to eight months repairing a converted railroad caboose that was on the property and that he intended to make his primary residence. Galarza used the Main Road every day while he was working on the structure. He used the key to unlock the green gate at Towerline Road, and drove up the Main Road to reach his land. No one stopped him from using the Main Road. Galarza gave Tony Berry permission to continue living on his property in the trailer, and Galarza occasionally saw Berry use the Main Road. Galarza did not see anyone else use the Main Road during this time. Berry moved from plaintiffs' property a few months after plaintiffs bought it.

After the completion of repairs, plaintiffs moved into the converted railroad caboose and lived there continuously until 1999. Galarza used the Main Road every day to reach his residence and no one stopped him from using it. He never tried to contact the owners of the adjoining parcels in the northwest quarter of section six and never sought permission from anyone to use the Main Road.

The locked green gate still exists at the beginning of the Main Road. Galarza kept the gate key that Tony Berry gave him. Galarza gave a copy of the key to his son, and placed a combination lock on the gate for his friends. He did not give the key or a copy of it to anyone else. Galarza had never been asked to return the key.

The Secondary and Northern Roads

Galarza testified he also used another unpaved road, the Secondary Road, to reach his property. The Secondary Road existed when he purchased his property in 1991, and it was in the same condition then as it appeared at trial. The Secondary Road starts at about the halfway point of the Main Road, proceeds northeast, crosses the adjoining parcel, goes up the crest of plaintiffs' hill, and enters plaintiffs' property slightly southeast of the Main Road entry.

Galarza began to use the Secondary Road in 1991, shortly after he bought the property, but his use was limited to days when it was raining and the Main Road was muddy. Galarza testified that between 1991 and 1997, he used the Main Road every day and used the Secondary Road "almost every day." Galarza believed the Secondary Road's surface appeared to have been constructed with heavy equipment because there were dirt mounds that had been moved to the side of the road. When plaintiffs bought the property in 1991, the dirt mounds were present on the side of the Secondary Road, but there was no vegetation growing on the path. About eight months before trial, Galarza was told to stop using the Secondary Road and, as a result, vegetation had started to grow on the path.

There was another unpaved road that connected plaintiffs' property to Towerline Road. This road followed the far northern border of the northwestern quarter of section six, and was called the "Northern Road." It started on the western side of the quarter, headed toward the northern border, then proceeded east across four steep canyons and valleys to the western edge of plaintiffs' property. Galarza never used the Northern Road to reach his property because the route was too steep, and he never tried to cross it with a two-wheel-drive vehicle.

Plaintiffs' son, Jose T. Galarza (Jose), testified he did not consider the Northern Road to actually be a road: "It is a bunch of steep hills that are right in the middle, just like a dry wash, you know. I don't consider them as a road." Jose was not "crazy enough" to drive across the Northern Road in a two-wheel-drive vehicle because "I could flip over easily. It is a 45-degree angle or more." He had never seen anyone cross the Northern Road in a two-wheel-drive vehicle, and never saw anyone use heavy equipment to improve the road.²

Plaintiffs lived on the property from 1992 until April 1999. Thereafter, Jose regularly lived on the property and continued to use the Main and Secondary Roads to reach the residence. Jose never asked anyone's permission to use the Main and Secondary Roads. At the time of trial, Jose had moved off the property, but plaintiffs had returned and again lived there as their primary residence.

Galarza meets defendant

In 1994 (prior to his 1999 purchase of the servient tenement), defendant purchased a 160-acre parcel near the northwest quarter of section six. In 1998, his father purchased

²Galarza testified there were other unpaved roads that crossed the northwestern quarter of section six. He used a road on the east side of the Main Road when he built a water well on his property. There was another road on southern portion of the quarter but Galarza never used it. These roads are not at issue in this case.

a nearby parcel of 640 acres. The Main and Secondary Roads did not cross these parcels. Defendant and his father grazed cattle on their land.

In the fall of 1995, defendant was on his property when he saw Galarza on the Main Road. Defendant testified Galarza introduced himself and asked if he could connect to defendant's water system. Galarza also offered to buy carrots from defendant to feed his goats. Defendant testified he told Galarza that he planned to buy a parcel in the northwest quarter of section six, and pointed out that the Main Road went through this property. Defendant told Galarza that he planned to build a cattle feed yard when he bought this property. Defendant also told Galarza that he could still use the Main Road to reach his property until defendant built the feed yard; thereafter, Galarza would have to use the Northern Road. Defendant testified that Galarza did not say anything in response or claim any right to use the Main Road. Defendant conceded that he did not have any legal right to the property when he had this conversation with Galarza.

At trial, Galarza testified this meeting occurred and that he asked to connect to defendant's water system and buy carrots. Galarza testified, however, that defendant never said he was going to build a cattle feed yard, and never said that Galarza would have to stop using the Main Road at any time. Galarza testified that defendant said he was thinking of buying a parcel in the northwest quarter of section six and "he was going to suggest, you know, giving me another road, another access to it." Galarza testified that he replied: "[W]hen you buy the property, then we'll talk."

Defendant testified he never saw Galarza use the Main Road in 1992, 1993, or 1994. However, he saw Galarza use the Main Road about 50 times in 1995. He saw Galarza use the road about once a week in 1996, and talked to Galarza about once a month. Defendant testified he never attempted to interfere with Galarza's use of the Main Road in 1995, 1996, or 1997.

Defendant was familiar with the Northern Road and described it as 20 feet wide. In 1997 or 1998, he used his father's bulldozer to cut a firebreak across the Northern

Road to protect his family's property in the area. He had not graded the Northern Road since he cut the firebreak. He had driven across the road in a two-wheel-drive vehicle when the ground was dry, but had to use a four-wheel-drive truck to cross it when the ground was wet.

Plaintiffs' son, Jose, testified he had never seen defendant drive across the Northern Road. Galarza once saw defendant drive across the Northern Road in a pickup truck with dual tires, and had also seen defendant improving the road.

Defendant's property (the servient tenement)

In April 1998, defendant entered escrow to buy a 148-acre parcel in the northwest quarter of section six, directly southwest of plaintiffs' land. Defendant's property was an undeveloped agricultural and ranching parcel, and contained hills and valleys. Defendant planned to build a cattle feed yard on the property. Defendant purchased the property at \$250 per acre, for a total price of approximately \$36,000. Defendant inspected the property before he purchased it and knew there were a lot of cattle trails, holes, and unnatural conditions on the land. The topsoil had eroded from some of the cattle trails.

It is undisputed that the Main and Secondary Roads proceed across defendant's property. However, defendant testified the Secondary Road did not even exist before May 1998, and it had been covered with grass and vegetation. While the property was in escrow, defendant inspected the Secondary Road and determined the soil had been damaged by vehicular use. There was no topsoil and the cars were just driving across rock and bare ground. Defendant saw plaintiffs' car and other vehicles using the Secondary Road to get to plaintiffs' property. Defendant recognized there was erosion and knew it could get worse if he did not do anything, but he continued the escrow and did not try to cancel the purchase agreement. Defendant testified that he spoke to Galarza during the long escrow period, and told Galarza he could not use the Main Road after he built the cattle feed yard on his new property.

In March 1999, escrow closed and defendant became the owner of the property. Defendant testified there was not any topsoil on the Main Road, but he graded it so trucks could enter his property. Defendant testified the Secondary Road's surface was rutted and eroding, but he did not try to fix it because he knew it would be very expensive. However, defendant admitted he never gave Galarza any written demand to stop him from using the Main and/or Secondary Roads after he bought his property in March 1999, and never posted any notice for people not to use the Main Road.

Galarza testified he continued to use the Main Road after defendant purchased the property and he even tried to improve the road's condition. He purchased a couple of loads of rocks and spread them on the Main Road, toward the hillside of his property. Galarza did not ask anyone for permission or reimbursement to improve the Main Road. The rocks improved his ability to use the Main Road, and were still there at the time of trial. Galarza did not make any other improvements to the Main Road.

The legal disputes

Galarza testified that after he purchased his property in 1991, he hired an attorney to determine who owned the property traversed by the Main Road. In 1992 and 1993, plaintiffs' attorney wrote a series of letters to the prior owners of the servient tenement. Galarza unsuccessfully tried to buy that property or obtain an easement from defendant's predecessors-in-interest. However, Galarza never made any agreement with the prior owners of the servient tenement to relinquish his right to use the Main Road. Galarza never observed any signs posted on the Main Road to either grant or deny permission to use it.

The instant disputes apparently began when defendant built a fence across his boundary on the servient tenement that blocked Galarza's access to the Main Road. Defendant told Galarza he had to use Towerline Road and the Northern Road to drive to his property. Defendant also told Galarza to stop using the Secondary Road.

On April 25, 2000, plaintiffs filed a complaint against defendant to quiet title and for an easement by prescription over the Main Road. Plaintiffs alleged they perfected a prescriptive easement on the Main Road based on their actual, open, exclusive, hostile, adverse possession and use of the easement for a continuous period of more than five years.

On June 20, 2000, defendant filed a general denial and alleged plaintiffs' use of defendant's property had been permissive rather than open, notorious, or hostile. Defendant alleged plaintiffs should be denied relief based on various legal and equitable doctrines, including "unclean hands."

Defendant also filed a cross-complaint against plaintiffs for trespass and sought damages and injunctive relief. Defendant denied plaintiffs had any prescriptive rights to the Main Road and alleged plaintiffs' use of the easement constituted a trespass. Defendant further alleged plaintiffs damaged his property through their continued crossing of the servient tenement and inflicted erosion and vehicular ruts, which required defendant to restore his land to its natural condition.

The trial court's rulings

After trial, the court found plaintiffs met their burden of proving a prescriptive easement over the Main Road. The court found no evidence of trespass or that plaintiffs caused any measurable damages in the area of the Secondary Road.

DISCUSSION

I. Substantial evidence of the prescriptive easement

Defendant contends the court abused its discretion in finding a prescriptive easement over the Main Road because there is insufficient evidence plaintiffs' use of the road was "hostile" because he allowed plaintiffs to make "permissive" use of the road as a "neighborly accommodation."

The elements of a prescriptive easement are "(a) open and notorious use; (b) continuous and uninterrupted use; (c) hostile to the true owner; (d) under claim of right;

and (e) for the statutory period of five years. (Civ. Code, § 1007; Code Civ. Proc., § 321).” (*Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 593; accord, *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570; *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1045; *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305.) These elements “are designed to insure that the owner of the real property which is being encroached upon has actual or constructive notice of the adverse use and to provide sufficient time to take necessary action to prevent that adverse use from ripening into a prescriptive easement.” (*Berry v. Sbragia* (1978) 76 Cal.App.3d 876, 880, disapproved on other grounds in *Gilardi v. Hallam* (1981) 30 Cal.3d 317, 326.)

The party asserting the claim to a prescriptive easement has the burden of proof as to the existence of the requisite elements, and it is question of fact as to whether these elements have been established. (*Zimmer v. Dykstra* (1974) 39 Cal.App.3d 422, 431; *Berry v. Sbragia, supra*, 76 Cal.App.3d 876, 880; *Lynch v. Glass* (1975) 44 Cal.App.3d 943, 950; *Connolly v. McDermott* (1984) 162 Cal.App.3d 973, 976.) “[W]hen one who claims an easement by prescription offers satisfactory evidence that all the required elements existed, the burden of showing that the use was merely permissive shifts to the owner of the land.” (*Chapman v. Sky L’Onda etc. Water Co.* (1945) 69 Cal.App.2d 667, 678; *Twin Peaks Land Co. v. Briggs, supra*, 130 Cal.App.3d 587, 594.)

When there is conflicting evidence as to the prescriptive use of a private roadway, it is the sole province of the trier of fact to determine whether the prescriptive title thereto has been established. (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 709.) On appeal, all conflicts must be resolved in favor of the prevailing party and the evidence must be viewed in a light most favorable to that party. If there is any substantial evidence to support the judgment, it must be affirmed. (*Zimmer v. Dykstra, supra*, 39 Cal.App.3d 422, 431; *Lynch v. Glass, supra*, 44 Cal.App.3d 943, 950; *Connolly v. McDermott, supra*, 162 Cal.App.3d 973, 976.)

At trial, the parties stipulated that plaintiffs' use of the Main Road had been open, notorious, and continuous for the requisite statutory period of five years, but the disputed question was whether such use had been "hostile." Once knowledge of use is established, the key issue becomes one of permissive use under license as against adverse use under claim of right. (*Applegate v. Ota, supra*, 146 Cal.App.3d 702, 709.) A prescriptive title cannot arise out of an agreement, but must be acquired adversely, and it cannot be adverse when it rests upon a license or mere neighborly accommodation. (*Case v. Uridge* (1960) 180 Cal.App.2d 1, 8; *Sylva v. Kuck* (1966) 240 Cal.App.2d 127, 133; *O'Banion v. Borba* (1948) 32 Cal.2d 145, 150.) "The requirement of 'hostility' ... means ... the claimant's possession must be adverse to the record owner, 'unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter.' [Citation.]" (*Sorensen v. Costa* (1948) 32 Cal.2d 453, 459; *Otay Water Dist. v. Beckwith, supra*, 1 Cal.App.4th 1041, 1045-1046; accord, *Buic v. Buic* (1992) 5 Cal.App.4th 1600, 1605.) A use of property with the express or implied permission of the owner or that is a mere matter of neighborly accommodation is not adverse and will not support a prescriptive easement. (*Jones v. Tierney-Sinclair* (1945) 71 Cal.App.2d 366, 370; *Clarke v. Clarke* (1901) 133 Cal. 667, 670.) The hostile use of a road does not ripen into a prescriptive easement unless the party against whom it is asserted has actual or constructive knowledge of such use. (*Lynch v. Glass, supra*, 44 Cal.App.3d 943, 950.) By definition, such use may not be clandestine. (*Connolly v. McDermott, supra*, 162 Cal.App.3d 973, 977.)

"[C]ontinuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence and in the absence of evidence of mere permissive use it will be sufficient to sustain a judgment. [Citation.] [¶] ... Whether the use is hostile or is merely a matter of neighborly accommodation, however, is a question of fact to be determined in light of the surrounding circumstances and the relationship between the parties." (*Warsaw v. Chicago Metallic Ceilings, Inc., supra*, 35 Cal.3d 564, 571-572.)

Either express or implied permission rebuts adversity. (*Jones v. Tierney-Sinclair, supra*, 71 Cal.App.2d 366, 370.)

In the instant case, there is overwhelming evidence of plaintiffs' hostile claim of right to use the Main Road to reach his property. Plaintiffs' claim of right was from the inception of their purchase of the dominant tenement, and defendant admitted that he repeatedly observed plaintiffs using the road. Defendant never presented any evidence of a permissive use or neighborly accommodation; no permission was ever asked for nor was any given, and no one questioned plaintiffs' right to use the road. (See *Twin Peaks Land Co. v. Briggs, supra*, 130 Cal.App.3d 587, 593-594.) Plaintiffs' use of the Main Road could not have originated in any permission from defendant, for such use had existed and continued for many years before defendant ever acquired the servient tenement, and the fact that plaintiffs never asked permission to use the road suggests a claim of right to do so. (See *Marangi v. Domenici* (1958) 161 Cal.App.2d 552, 557.) Plaintiffs' open, continued, and hostile use of the Main Road, even in light of defendant's stated intent to buy the servient tenement and potentially cut off their access to the road, is inconsistent with any idea of neighborly accommodation or permissive use. (*Ibid.*)

Defendant insists that plaintiffs' use of the Main Road was always permissive and a neighborly accommodation. However, there is no evidence of a permissive use or neighborly accommodation given to plaintiffs by defendant or any of his predecessors-in-interest. Indeed, none of the prior owners of the servient tenement testified at trial or offered any evidence about conversations or permissive uses granted to plaintiffs. Instead, Galarza testified that he obtained a key to the locked gate and used the Main Road on a daily basis for the requisite statutory period of five years. He never asked anyone for permission, no one posted signs on the road, and no one challenged his ability to use the road to reach his property. (See *Applegate v. Ota, supra*, 146 Cal.App.3d 702, 710.)

Defendant asserts that he advised Galarza of his plans to buy the servient tenement and construct a cattle feed yard, and warned Galarza that he would not be allowed to use the Main Road anymore. Defendant testified that Galarza was silent and did not assert any right to use the Main Road. In contrast, Galarza testified that his response to defendant's plan to buy the property was that they would talk about the road after defendant actually bought the land. This evidentiary conflict raised a question for fact for the court. Nevertheless, it is undisputed that this conversation occurred in the fall of 1995, *before* defendant had any legal right to the servient tenement. There is no evidence that defendant reasserted his objections to plaintiffs' use of the Main Road after escrow closed on the servient tenement in March 1999 until the instant dispute began. Defendant thus lacked any legal right to warn Galarza, and their conversation reflected defendant's knowledge of plaintiffs' continuous and hostile use of the Main Road.

Defendant also asserts plaintiffs' use of the Main Road was not hostile because they hired an attorney and attempted to obtain an easement or buy the servient tenement. It has been held that such offers are recognition of the record owner's title. (See *Clark v. Redlich* (1957) 147 Cal.App.2d 500, 504-505.) Galarza acknowledged he attempted to secure an easement and/or buy the servient tenement in 1992 and 1993, but these attempts were unsuccessful. However, there is no evidence defendant was aware of Galarza's offers or that defendant's predecessors-in-interest informed defendant of any negotiations. In addition, there is overwhelming evidence of plaintiffs' continued hostile and adverse use for five years after these offers were made. Indeed, plaintiffs' failure to negotiate an easement with defendant's predecessors-in-interest is further evidence that no permission was given or contemplated to use the Main Road. (See *Warsaw v. Chicago Metallic Ceilings, Inc.*, *supra*, 35 Cal.3d 564, 572.)

Finally, defendant asserts plaintiffs never told anyone they claimed a right to cross the servient tenement before the instant litigation. Defendant argues he could not be expected to anticipate plaintiffs' unstated intent to claim a hostile right to use the Main

Road. However, there is substantial evidence of plaintiffs' open and hostile use rather than a mere neighborly accommodation. Plaintiffs used the Main Road for over five years. There is no evidence of concealment or furtive conduct. There was no break in their essential attitude of mind required for adverse use. (See *Twin Peaks Land Co. v. Briggs*, *supra*, 130 Cal.App.3d 587, 593-594; *Zimmer v. Dykstra*, *supra*, 39 Cal.App.3d 422, 432.)

We therefore conclude there is substantial evidence that plaintiffs' use of the Main Road was at all times hostile, adverse, and exercised under a claim of right, and defendant failed to present any evidence of permissive use. (See *Zimmer v. Dykstra*, *supra*, 39 Cal.App.3d 422, 433.)

II. Unclean Hands

Defendant next contends the court should have refused to grant plaintiffs the prescriptive easement over the Main Road because of plaintiffs' "unclean hands" since they lived on their property without the requisite government documents.

In defendant's answer to the complaint, he raised several affirmative defenses, including the claim that plaintiffs should be denied any relief based on the doctrine of unclean hands. At the bench trial, after plaintiffs rested their case, defendant moved for nonsuit based on plaintiffs' alleged "unclean hands." Defendant argued plaintiffs used the Main Road to live on their property, but they never obtained a certificate of occupancy from any government agency to live in the converted railroad caboose. Defendant argued plaintiffs were trying to obtain a prescriptive easement to violate the law and commit the illegal act of living on the property without complying with Kern County ordinances. Defendant did not specify which ordinances were being violated, but argued that plaintiffs admitted they lived there without the appropriate documentation and there was no dispute they illegally occupied the property. Defendant argued the court could not assist plaintiffs' violation of the law by granting them the prescriptive easement.

Plaintiffs asserted they were attempting to perfect their prescriptive easement to bring their property into compliance and obtain the requisite county permits, and plaintiffs were forced to bring the quiet title action in their efforts to comply with the law. Plaintiffs also argued there was no evidence as to which permits were required for them to live on the property and they still had the right to obtain access to their property. The court submitted the nonsuit motion but never expressly ruled on it. The court did not address the “unclean hands” argument in the statement of decision.

The doctrine of unclean hands “rests on the maxim that ‘he who comes into equity must come with clean hands.’ [Citation.] “‘This maxim is far more than a mere banality. It ... closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.’” [Citation.] In California, the doctrine of unclean hands may apply to legal as well as equitable claims [citation] and to both tort and contract remedies [citations].” (*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620, 638-639.)

“The unclean hands rule does not call for denial of relief to a plaintiff guilty of any past improper conduct; it is only misconduct in the particular transaction or connected with the subject matter of the litigation which is a defense. [Citation.] The bar applies only if the inequitable conduct occurred in a transaction directly related to the matter before the court and affects the equitable relationship between the litigants. [Citation.]” (*Wilson v. S. L. Rey, Inc.* (1993) 17 Cal.App.4th 234, 244.) “In short, ‘[t]he misconduct must infect the cause of action before the court.’” (*Unilogic, Inc. v. Burroughs Corporation* (1992) 10 Cal.App.4th 612, 621, quoting *Carman v. Athearn* (1947) 77 Cal.App.2d 585, 598.)

Moreover, “[t]he unclean hands doctrine protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubts as to the justice provided by the judicial system.

Thus, precluding recovery to the unclean plaintiff protects the court's, rather than the opposing party's, interests.” (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) The court must consider both the degree of harm caused by the plaintiff's misconduct and the extent of the plaintiff's alleged damages. (*Republic Molding Corporation v. B.W. Photo Utilities* (9th Cir. 1963) 319 F.2d 347, 349-350.) Whether the defense applies in particular circumstances depends on the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries. (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1060.) The decision whether to apply the defense based on the facts is a matter within the trial court's discretion. (*Lovett v. Carrasco* (1998) 63 Cal.App.4th 48, 55.)

Defendant insists the trial court should have refused to grant plaintiffs the prescriptive easement on the Main Road, based on the defense of unclean hands, because plaintiffs illegally lived on their property in the converted railroad caboose without the requisite government permits. Defendant argues the court's decision to grant the prescriptive easement was not equitable because it acknowledged plaintiffs used the Main Road to illegally live on the property for the statutory time period. However, this alleged “misconduct” had nothing to do with plaintiffs' ability to drive across the Main Road to reach their property. While Galarza admitted his family lived in the converted railroad caboose without a “certificate of occupancy,” defendant never presented any evidence as to which governmental regulations plaintiffs violated by their presence on the property, or whether their failure to obtain a “certificate of occupancy” was an illegal act. Indeed, defendant failed to present any evidence to connect plaintiffs' attempt to obtain the prescriptive easement over the Main Road with their purported violation of the building codes. Plaintiffs established their open, notorious, continuous, and hostile use of the Main Road to reach their property aside from the existence of the residence. The trial court properly denied defendant's motion for nonsuit and declined to rely on the defense of unclean hands to deny plaintiffs' right to the prescriptive easement.

III. Trespass and Damages

In what is essentially another substantial evidence challenge, defendant claims the trial court should have found plaintiffs trespassed over the Secondary Road and inflicted damages to the land based on their vehicular use of the path. Defendant notes the court declined to find plaintiffs had a prescriptive easement over the Secondary Road, and asserts there is no evidence to support the court's finding that plaintiffs' use of the road was permissive. Defendant argues he presented evidence of the destruction and erosion of the topsoil, and the court should have awarded damages for the trespass. Instead the court found that, in any event, there were no measurable damages attributable to plaintiffs' conduct; this finding, according to defendant, is unsupported in the testimony.

Defendant presented two witnesses regarding the alleged damage to the Secondary Road. C. J. Watson testified to the costs of restoring the land to its natural condition, which had been altered due to the erosive effect of vehicle travel; but he had no information as to when the road had been created or when the erosion had begun from vehicles passing over the terrain. Julie Antes testified to her belief that the value of the property had been reduced because of the Secondary Road's existence and the attendant erosion caused by its use; however she did not know whether the road and its condition pre-existed defendant's acquisition of the property.

For purposes of this discussion we will presume the correctness of the court's determination plaintiffs acquired no prescriptive easement over the Secondary Road. Defendant insists the court's failure to find a prescriptive easement necessarily meant that plaintiffs trespassed on the servient tenement when they used the Secondary Road. "The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another." (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16; *Cassinis v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1778.) The tort may be committed by an act that is intentional, reckless or negligent. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 604, p. 704.) Entry of property in emergencies, for

reasons of public necessity, or to avert disaster such as fire or flood, is privileged and does not constitute a trespass. (*Id.* at § 608, p. 706.) The complaining party must be in lawful possession of the property at the time of the trespass. (*Risco v. Reuss* (1941) 45 Cal.App.2d 243, 244; *Covo v. Lobue* (1963) 220 Cal.App.2d 218, 221.)

Ordinarily, the recognized measure of damages for trespass is the difference in the value of the real property immediately before and immediately after the injury. (*Frustruck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 367.) This method, however, is not exclusive. (*Ibid.*) If the trespass involves the destruction of pasturage, the measure of damages generally consists of the reasonable rental value of the destroyed pasturage. (*Murphy v. Nielsen* (1955) 132 Cal.App.2d 396, 398-401; see also *Cassinovs v. Union Oil Co.*, *supra*, 14 Cal.App.4th 1770, 1777.)

Defendant's arguments fail for several reasons. First, the trial court found the Secondary Road was essentially a fork of the Main Road and a ridgeline that remained passable in wet weather. Unlike the Main Road, it was not an established roadway and was infrequently used. Substantial evidence supports the notion plaintiffs' use of the road was limited to situations of necessity to avoid being stuck in the mud while driving up the hill and such use occurred with permission. Second, plaintiffs' use of the Secondary Road began before defendant purchased the servient tenement, and defendant admitted he was aware of the land's condition before escrow closed on his purchase. Defendant thus lacked standing to claim trespass damages for any of plaintiffs' actions prior to March 1999. Third, defendant failed to present any evidence of the diminution in value that may have occurred after he bought the property, or the reasonable rental value of the destroyed pasturage. Instead, defendant's claim of \$30,000 in damages was based on the cost of restoring the Secondary Road and the surrounding area to its natural state, and repairing the damage purportedly inflicted by plaintiffs' trespass. However, defendant purchased his property fully aware of the land's condition, the rutted cattle paths, and the continuing erosion over the surface. He failed to stop the escrow even

though he knew about the unnatural conditions on his property, and failed to take any actions to stop the destruction of the topsoil because he decided it was too expensive. Substantial evidence supported the trial court's rejection of defendant's cross-complaint for trespass and damages against plaintiffs.

CONCLUSION

The trial court's finding of a prescriptive easement on the Main Road is supported by substantial evidence, and the court properly rejected defendant's attempted reliance on the doctrine of unclean hands. The court's rejection of defendant's claim for trespass and damages regarding the Secondary Road likewise finds sustainable support in the evidence.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiffs.

VARTABEDIAN, J.

WE CONCUR:

DIBIASO, Acting P. J.

CORNELL, J.